IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 11, 2005

STATE OF TENNESSEE v. CALVIN LEWIS HILL

Direct Appeal from the Circuit Court for Marshall County
No. 15857 Charles Lee, Judge

No. M2004-02199-CCA-R3-CD - Filed August 23, 2005

A Marshall County Circuit Court jury convicted the appellant of burglary and theft over $500. The trial court sentenced him to concurrent sentences of six years, ten months for the burglary conviction and three years for the theft conviction. In this appeal, the appellant claims (1) that the evidence is insufficient to support the convictions and (2) that the trial court erred by refusing to allow a defense witness to testify and by refusing to allow him to present extrinsic proof concerning the witness' prior inconsistent statement. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Hershell D. Koger (on appeal), Pulaski, Tennessee, and Chad L. Riddle (at trial), Murfreesboro, Tennessee, for the appellant, Calvin Lewis Hill.

Paul G. Summers, Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; William Michael McCowan, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

Linda Salway testified that she was a member of the Lighthouse Independent Baptist Church in Lewisburg and that the pastor of the church was Reverend Steven Leathers. On Sunday, April 20, 2003, the church had a guest speaker for its Sunday school, 11:00 a.m. worship service, and 6:00 p.m. worship service. Ms. Salway stated that a large plastic water jug was in the front of the church sanctuary, that church members put money in the jug, and that the jug was about one-half full of coins and five-dollar, ten-dollar, and twenty-dollar bills.

Ms. Salway testified that after the 11:00 a.m. service on April 20, she saw the appellant outside and learned that he needed a place to stay. That evening, Ms. Salway returned to the church for the 6:00 p.m. service. Reverend Leathers was sitting in a pew a couple of rows back from the guest speaker. During the service, the appellant came into the church, sat in front of Reverend Leathers, and turned around and began speaking to the reverend. Reverend Leathers said something to the appellant, and the appellant turned around and faced the front of the church. Ms. Salway stated that after the evening service was over, everyone left the church and the church was locked for the night. She said that the money jug had been in the sanctuary at the end of the 6:00 p.m. service and that she never saw the appellant go near the jug.

About 7:00 a.m. on April 21, Ms. Salway received a telephone call from the church custodian. In response to the call, Ms. Salway telephoned another church member, Lyle Alwardt, and asked him to meet her at the church. When they arrived, Ms. Salway and Mr. Alwardt walked to the back of the church and saw that a basement, ground-level window had been broken. Ms. Salway and Mr. Alwardt went into the church sanctuary and discovered that the money jug was gone. A tablecloth that had been in the basement was also missing, and Ms. Salway telephoned the police. Later that day, Ms. Salway searched along some railroad tracks near the church and found the money jug, which was empty except for a one-dollar bill. On cross-examination, Ms. Salway testified that she had never counted the money in the jug but that she had moved the jug and it was very heavy.

Lyle Alwardt testified that he was a member of the Lighthouse Independent Baptist Church. On the morning of April 20, 2003, he saw an African-American male sitting in the church. He gave the man a visitor card, and the man filled it out. During the 11:00 a.m. worship service, Mr. Alwardt passed the man a collection plate. The man emptied his pockets and put a nickle and four pennies in the plate. After the service, the man followed Reverend Leathers "like a shadow." Mr. Alwardt said that the man never went near the money jug, which was at the front of the sanctuary.

Mr. Alwardt testified that he returned to the church later that day for the evening service. After the service started, the African-American man came into the sanctuary, sat in front of Reverend Leathers, and kept turning around and talking to the reverend. After the service, Reverend Leathers and the man went into the pastor's office. The next morning, Mr. Alwardt received a telephone call from Linda Salway and went to the church. He and Ms. Salway walked around the outside of the building and saw that a basement window had been broken. When they went inside the church, Mr. Alwardt and Ms. Salway discovered that the money jug was gone. Mr. Alwardt testified that the jug had been one-half full of coins and paper money.

Steven Leathers testified that he was the reverend of the Lighthouse Independent Baptist Church. On April 20, 2003, Reverend Leathers arrived at the church before Sunday school and went into his office. The appellant knocked on the door, came in, and told Reverend Leathers that he had no money and needed financial help. Reverend Leathers and the appellant then went into the sanctuary for Sunday school and the 11:00 a.m. church service. After the 11:00 a.m. service, Reverend Leathers gave the appellant five dollars and dropped him off at McDonald's. Reverend Leathers also told the appellant to return to the church for the evening worship service.

Reverend Leathers testified that the appellant had told him that the appellant was staying at the Richland Motel. Reverend Leathers telephoned the motel, and someone there told him that another church also had been helping the appellant. Reverend Leathers returned to the church that evening for the 6:00 p.m. service. The appellant came to the service late, sat in front of Reverend Leathers, and began talking to him. Reverend Leathers related that he told the appellant to be quiet. He said that the appellant kept talking and that he told the appellant to shut up. After the service, Reverend Leathers told the appellant that the church could not help him, and the appellant left. Reverend Leathers testified that he never saw the appellant touch the money jug. He stated that the church had collected money in a similar jug before and that the first jug contained $500 or $600 when it was emptied. He said the first jug contained mostly coins but could not remember how full the jug had been when it was emptied. He said that unlike the first jug, the jug in the present case contained more ten- and twenty-dollar bills. He stated that he had put about $250 in the stolen jug, and he estimated that it had contained about $800.

Officer Billy Duckworth of the Lewisburg City Police Department testified that he was dispatched to the Lighthouse Independent Baptist Church on the morning of April 21, 2003. He arrived about 7:15 a.m., walked to the back of the church, and saw that a ground-level window had been broken. Officer Duckworth then went into the church with Ms. Salway, and Ms. Salway showed him where the money jug had been. Officer Duckworth spoke with Reverend Leathers, and Reverend Leathers gave him the appellant's name. Officer Duckworth saw the appellant later that day and drove the appellant to the police department. On cross-examination, Officer Duckworth testified that he went into the appellant's motel room and saw some change on a nightstand. He said that the change was worth $3 to $4 and that he did not find any paper money. Officer Duckworth also saw two metal cans in the room.

Detective Kevin Patin of the Lewisburg City Police Department testified that he was dispatched to the church on April 21. He inspected the broken window, spoke with Officer Duckworth, and learned that the appellant had attended church the night before and had tried to get money from Reverend Leathers. Later that day, Detective Patin learned that the appellant had been taken to the police department. By the time Detective Patin arrived at the police department, another detective was already interviewing the appellant. Detective Patin testified that when the appellant was arrested, the appellant had $220 on his person. The appellant also had a deposit slip on his person, showing that the appellant had made a $30 deposit to his savings account that morning. Detective Patin fingerprinted the appellant. Around lunchtime, Detective Patin received a telephone call from Linda Salway and returned to the church. Ms. Salway showed Detective Patin the water jug that Ms. Salway had found near the railroad tracks. Detective Patin dusted the jug for fingerprints.

Agent David Houston Hoover of the Tennessee Bureau of Investigation Crime Laboratory testified that he was a special agent forensic scientist assigned to the latent print section of the laboratory. He compared the appellant's fingerprints to a palm print recovered from the water jug and concluded that the appellant's right palm print matched the palm print recovered from the jug. He related that a fingerprint recovered from the jug did not match the appellant.

Dena Henson testified that she was the branch supervisor and head teller for the First Farmers and Merchants National Bank. The appellant was a customer at the bank, and Ms. Henson had waited on the appellant before. On the morning of April 21, 2003, the appellant brought a Folgers coffee can full of change into the bank to be counted. The change was worth about $125, and Ms. Henson gave the appellant a $100 bill and some smaller bills. About an hour later, the appellant returned with two more coffee cans. One of the cans was full of change and the other can was one-half full. The change was worth about $100, and Ms. Henson gave the appellant another $100 bill. Ms. Henson related that while the appellant was waiting on the change to be counted, he paced back and forth in the lobby and acted nervous. She stated that the appellant had never before brought large amounts of change into the bank. When the prosecutor showed Ms. Henson the money that was found on the appellant's person, Ms. Henson stated that none of the bills were $100 bills.

Tommy Allen testified for the appellant that the appellant did painting work for him in April 2003. He stated that the appellant worked for him for about two weeks, that he paid the appellant $50 to $80 per day, and that he always paid the appellant in cash. He estimated that he had paid the appellant a total of $200 to $300. The jury convicted the appellant of burglary, a Class D felony, and theft over $500, a Class E felony. The trial court sentenced him as a Range II offender to six years, ten months for the burglary conviction and three years for the theft conviction.

II. Analysis

A. Sufficiency of the Evidence

The appellant claims that the evidence is insufficient to support his convictions. Regarding the burglary conviction, he contends that the evidence against him is circumstantial. Regarding the theft conviction, he contends that the evidence is insufficient to show that the amount of money in the jug was over $500. The State claims that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the jury as trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Moreover, we note that a guilty verdict can be based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. See State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). While a

guilty verdict may result from purely circumstantial evidence, in order to sustain the conviction the facts and circumstances of the offense "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 225 Tenn. 478, 482, 470 S.W.2d 610, 612 (1971).

In order to sustain the appellant's conviction for burglary, the State was required to prove that the appellant, without the effective consent of the property owner, entered a building other than a habitation with the intent to commit a theft. See Tenn. Code Ann. § 39-14-402(a)(1). A person is guilty of theft if that person, with the intent to deprive the owner of property, knowingly obtains or exercises control over the property without the owner's effective consent. See Tenn. Code Ann. § 39-14-103. If the value of the property is between $500 and $1,000, the theft is a Class E felony. See Tenn. Code Ann. § 39-14-105(2).

Taken in the light most favorable to the State, we believe that the evidence is sufficient to support the convictions. Regarding the burglary, the evidence shows that the appellant visited the church on April 20, 2003, and attended the morning and evening worship services. The appellant told Reverend Leathers that he did not have any money and that he needed financial help. After the evening service, Reverend Leathers told the appellant that the church would not be able to help him and the appellant left. No witnesses saw the appellant near the money jug, which was one-half full of coins and bills. The next morning, Ms. Salway and Mr. Alwardt discovered that someone had broken into the church and that the jug was missing. Ms. Salway later found the empty jug near some railroad tracks. Meanwhile, the appellant took a coffee can full of change to the bank to be counted. The appellant returned to the bank a short time later with two more coffee cans, one full and one half-filled with change. A palm print recovered from the jug matched the appellant's right palm, direct evidence linking him to the crime. In light of this direct and circumstantial evidence, we hold that the evidence is sufficient to support the appellant's burglary conviction.

Regarding the value of the theft, Reverend Leathers testified that the church had previously collected money in a similar water jug. The first jug, which contained mostly coins, was counted and found to contain between $500 and $600. Reverend Leathers related that the jug in the present case was one-half full but contained five-, ten-, and twenty-dollar bills in addition to the coins. He then stated that he had put about $250 in the jug and estimated, without objection, that the stolen jug had contained $800. See Tenn. R. Evid. 701(b). We hold that the evidence is sufficient to support the appellant's conviction for theft over $500.

B. Defense Witness' Prior Statement

Next, the appellant claims that the trial court erred by refusing to allow a witness, who allegedly confessed to burglarizing the church, to testify. He also claims that the trial court erred by refusing to allow him to present extrinsic proof concerning the witness' prior inconsistent statement. We agree with the appellant that the trial court erred. However, we conclude that the errors were harmless.

During the trial, the appellant informed the trial court that he wanted to call Thomas Jackson Tucker to testify. According to the appellant, Mr. Tucker, while in jail, had confessed to breaking into the Lighthouse Independent Baptist Church. The appellant also claimed that other men had heard Mr. Tucker confess to breaking into the church. In an offer of proof, the defense questioned Mr. Tucker about his jailhouse confession. However, Mr. Tucker denied telling anyone that he burglarized the church.

The trial court ruled that Mr. Tucker's testimony was irrelevant because he denied breaking into the church. The trial court also prohibited the defense from calling other witnesses to testify that they heard Mr. Tucker confess to the crime. In another offer of proof, Daniel Proctor testified that he had been in jail with Mr. Tucker and had heard Mr. Tucker admit to burglarizing the church.

Regarding the trial court's ruling that Mr. Tucker's testimony was irrelevant because he denied breaking into the church, we disagree. Evidence that someone other than the appellant burglarized the church is relevant. See Tenn. R. Evid. 401; see also Tenn. R. Evid. 403. Thus, the defense should have been able to question Mr. Tucker in front of the jury regarding whether he broke into the Lighthouse Independent Baptist Church and told others that he broke into the church.

Moreover, if Mr. Tucker had been allowed to testify and had denied telling others that he confessed to the crime, the defense would have been able to impeach Mr. Tucker with Mr. Proctor's testimony. Rule 613, Tenn. R. Evid., allows the use of prior inconsistent statements to impeach a witness. A party may interrogate the witness regarding the inconsistent statement as long as the witness is "afforded an opportunity to explain or deny the same." Tenn. R. Evid. 613(b). Once the witness denies making the prior inconsistent statement, Rule 613(b) allows counsel to introduce extrinsic proof of the prior inconsistent statement. Any prior inconsistent statement admitted under this rule should be used only for impeachment purposes; it should not be used as substantive evidence. Neil P. Cohen et al., Tennessee Law of Evidence, § 6.13[2][b], at 6-131 (4th ed. 2000). Thus, the trial court also erred by refusing to allow the appellant to impeach Mr. Tucker with Mr. Proctor's testimony.

Nevertheless, based upon our review of the evidence, we conclude that the trial court's errors were harmless. An error will not be grounds for reversal unless it affirmatively appears to have affected the result of the trial on the merits. Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). In light of the fact that the police found the appellant's palm print on the jug and that the appellant took a large amount of change to the bank the day after the burglary, we are unable to conclude that the admission of Mr. Tucker's or Mr. Proctor's testimony would have affected the outcome of the trial. Thus, the appellant is not entitled to relief on this issue.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.[1]

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NORMA McGEE OGLE, JUDGE

[1] We note that there are three indictments in the record, one for burglary and two for theft of property valued between $500 and $1,000. There are also three corresponding judgments of conviction in the record. According to the judgment forms for the thefts, the second theft count was merged into the first. However, the jury's verdict forms and the trial transcript indicate that the appellant was convicted of only one count of burglary and one count of theft. We cannot discern from the record the disposition of the second theft indictment.